FAIR POLITICAL PRACTICES COMMISSION

Memorandum

To: Chairman Getman and Commissioners Downey, Knox, and Swanson

From: C. Scott Tocher, Commission Counsel
Luisa Menchaca, General Counsel

Re: Emergency Adoption of Proposed Regulation 18572.2, Interpreting Section 85702, Defining "Acceptance of Contributions from A Lobbyist"

Date: June 23, 2002

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Government Code section 85702 governs campaign contributions from lobbyists. At its last meeting, the Commission adopted regulation 18572, which prohibits lobbyists from making contributions from personal funds and certain other funds that may be said to otherwise belong to the lobbyist and where the lobbyist directs the making of the contribution. (Ex. 1.)

While regulation 18572 is a strong interpretation that speaks to the lobbyist's "making" of a contribution, the Commission directed staff at the May meeting to analyze whether the statute might also be susceptible to a similarly strong construction relating to a candidate's acceptance of contributions from lobbyists. Specifically, *the Commission asked staff to consider whether section 85702 prohibits candidates from accepting contributions delivered by lobbyists, even if those contributions are comprised of funds that belong to someone else entirely, such as a client.* The Commission may determine that the first clause of section 85702 is merely a restatement of the prohibition contained in the rest of the statute, or may conclude that it addresses separate conduct in a different scenario.

This memorandum analyzes the statutory and policy considerations involved in this interpretation. While the memorandum reserves policy judgments for the Commission, because of the proximity to the November election, staff proposes that, if the Commission decides to adopt a regulation, it do so on an emergency basis. (Ex. 2.)

I. THE CURRENT LOBBYIST CONTRIBUTION BAN – SECTION 85702

A. Introduction.

Proposition 34 added section 85702 to the Act:

> "*An elected state officer or candidate for elected state office may not accept a contribution from a lobbyist,* and a lobbyist may not make a

> contribution to an elected state officer or candidate for elected state office, *if that lobbyist is registered to lobby the governmental agency for which the candidate is seeking election or the governmental agency of the elected state officer*."[1] (Emphasis added.)

The issue presented here is the scope of the statute's ban on candidates "accept[ing] a contribution from a lobbyist."

B. The Lobbyist Contribution Ban – A Historical Narrowing of the Ban's Scope

1. A Lobbyist Cannot Be Prohibited from Advising A Client

The Act, from its inception, has contained varying versions of a lobbyist contribution ban. As passed by the voters in 1974, Proposition 9 had a provision, 86202, which addressed lobbyist contributions:

> "**86202.** It shall be unlawful for a lobbyist to make a contribution or to act as an agent or intermediary in the making of any contribution, or to arrange for the making of any contribution by himself or by any other person."

As can be seen, section 86202 was broader than the current incarnation, barring a lobbyist from making, acting as an intermediary and arranging a contribution by himself for another. The Commission originally interpreted the "to arrange for" language in Section 86202 to forbid a lobbyist from advising his or her employer to make a contribution, if that advice "was a causal element" in the making of the contribution. (*Institute of Governmental Advocates v. Younger* (1977) 70 Cal.App.3d 878, 881.) A Superior Court enjoined the Commission from enforcing this interpretation because it violated the First Amendment speech rights of the lobbyist and lobbyist's employer; the Second District Court of Appeals affirmed. (*Id*., at p. 884.) At issue was whether a statute could prohibit communications between a lobbyist and employer designed to influence the employer's decision to make, or to withhold, a political contribution. The court concluded such a prohibition violated the First Amendment's free speech[2] guarantee because the statute restricted speech and could have a "chilling effect" on legitimate

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[1] Section 82024, already part of the Act, defines "elective state office" as follows:

"'Elective state office' means the office of Governor, Lieutenant Governor, Attorney General, Insurance Commissioner, Controller, Secretary of State, Treasurer, Superintendent of Public Instruction, Member of the Legislature, member elected to the Board of Administration of the Public Employees' Retirement System, and member of the State Board of Equalization."

[2] Regulation in the arena of campaign and lobbyist conduct sometimes may implicate the First Amendment to the United States Constitution. As will be seen below, depending on the statute, issue and court, the analysis sometimes proceeds under the amendment's guarantees of free speech, free association or perhaps both.

speech. (*Id*.) Thus, the case illustrates that prohibitions on words that restrict legitimate speech – in this case use of the lobbyist's expertise to advise his or her client – will be looked at with disfavor under the First Amendment. The case did not consider, however, the issue of whether a lobbyist could be prohibited from delivering a contribution or acting as an intermediary for another, or from advising persons other than his or her client.

The entirety of section 86202 eventually was declared unconstitutional in *Fair Political Practices Commission v. Superior Court* (1979) 25 Cal.3d 33, 45, on the ground that the prohibition against the making of contributions by lobbyists impermissibly infringed the lobbyists' First Amendment right to associate with candidates by making contributions. The Court found a compelling state interest in the ban, namely "...rid[ding] the political system of both apparent and actual corruption and improper influence." However, because the prohibition on lobbyist *contributions* (as opposed to *delivering* others' contributions) was a "substantial restriction" on the lobbyists' freedom of association, the Court applied strict scrutiny to the prohibition. The Court concluded that the ban was not narrowly tailored to serve that interest for three reasons: (1) the rule barred all contributions to all candidates, even ones the lobbyist might never have opportunity to lobby; (2) "lobbyist" was defined broadly in the Act; and (3) the rule did not distinguish between large and small contributions. (*Id*.) Section 86202 was repealed in 1984. (Stats. 1984, ch. 161.)

The Court did not address whether the regulation of a lobbyist's delivery of another's contribution implicated any constitutional protections. It did, however, acknowledge that "either apparent or actual political corruption might warrant some restriction of lobbyist associational freedom," though not the "total prohibition of all contributions by all lobbyists to all candidates" contemplated by the statute. (*FPPC., supra,* 25 Cal.3d at p.45.)

2. Proposition 208 Ban Applies to Contributions "through" a Lobbyist

In 1996, after a series of scandals culminating in the conviction of five legislators on felony racketeering, extortion, bribery and money laundering charges,[3] the voters enacted Proposition 208. Section 85704 prohibited campaign contributions and officeholder account contributions "from, through, or arranged by" a state or local registered lobbyist. Former section 85704 read:

> "**85704.** No elected officeholder, candidate, or the candidate's controlled committee may solicit or accept a campaign contribution or contribution to an officeholder account from, through, or arranged by a registered state or local lobbyist if that lobbyist finances, engages, or is authorized to engage

[3] (*California ProLife Council PAC v. Scully* (1998) 989 F.Supp. 1282, Findings of Fact, 4/5/99, #61.) Some of these convictions involved circumstances in which lobbyists, actual or undercover FBI agents, played a role in the connection of legislative action in return for contributions.

in lobbying the governmental agency for which the candidate is seeking election or the governmental agency of the officeholder."

More narrowly tailored than Proposition 9, Proposition 208's section 85704 nonetheless was enjoined by a federal court in January 1998, along with many other provisions of that proposition. Section 85704 prohibited only contributions from a lobbyist "who finances, engages in or is authorized to engage" in lobbying of the agency associated with the recipient. That statute, unlike the current section 85702, barred not only contributions *from* a lobbyist but also contributions "*through or arranged by*" a lobbyist. Prior to the injunction of section 85704, the Commission adopted Regulation 18626 interpreting "from, through, or arranged by" a lobbyist:[4]

"**18626. Contributions from Lobbyists**

(a) Contributions “from” a lobbyist.

(1) A contribution is from a lobbyist when the contribution is made from the lobbyist’s personal funds or resources, except that if the contribution is made from a lobbyist’s joint checking account, 2 Cal. Code Regs. § 18533 shall be used to determine whether the contribution is from the lobbyist.

(b) Contributions “through” a lobbyist.

(1) A contribution is “through” a lobbyist when the cash, check, or other negotiable instrument by which the contribution is made is delivered or transmitted, by any means, by a lobbyist.

(2) Neither Government Code Sections 85704, 85313(c), nor this regulation shall be construed to forbid a lobbyist from attending a fundraising event using a ticket purchased by any person other than a lobbyist.

(c) Contributions “arranged by” a lobbyist.

(1) A contribution is “arranged by” a lobbyist when the lobbyist exercises primary control over the contribution, including the decisions whether to make a contribution, to whom to make the contribution, or the amount of the contribution.

(2) Neither Government Code Sections 85704, 85313(c), nor this regulation shall be construed to forbid a lobbyist from advising his or her client, in private communication, about contributions.

(d) Solicitation of a contribution from, through, or arranged by a registered state or local lobbyist, within the meaning of Government Code Sections 85704 and 85313(c), includes but is not limited to:

(1) Solicitations directed to a lobbyist for further transmittal or forwarding to the lobbyist’s client or employer.

[4] This regulation was repealed by the Commission, along with other Proposition 208 regulations, in May of 2001.

(2) Solicitations directed to a lobbyist's client or employer, but sent "in care of" the lobbyist.

..."

While the statute was preliminarily enjoined by the federal court, nowhere in the Court's opinion is section 85704 discussed, other than to note its existence when describing the various aspects of Proposition 208. (*California ProLife Council PAC v. Scully* (1998) 989 F.Supp. 1282, 1292.) In its findings of fact, the Court found that lobbyists were "severely limited in their ability to fully participate in conversations" regarding contributions their clients might make. (Findings of Fact, 4/5/99, #444.) The Court also found lobbyists' speech and associational rights severely limited. (*Id*.) Unlike the Court in *Fair Political Practices Commission v. Superior Cour*t, *supra,* however, the Proposition 208 Court did not discuss those findings with respect to any particular ruling regarding the lobbyist ban of section 85704. Nor did the court expressly consider whether contributions "through" a lobbyist were constitutionally infirm.

Before the Court could finally adjudicate the constitutionality of this provision, Proposition 208 was repealed by Proposition 34. Thus, the Proposition 208 litigation, as the Proposition 9 litigation, did not address the question at issue in the subject regulation.

3. Current Law: Section 85702.

Current section 85702 became law on January 1, 2001:

"**85702.** *An elected state officer or candidate for elected state office may not accept a contribution from a lobbyist*, and a lobbyist may not make a contribution to an elected state officer or candidate for elected state office, *if that lobbyist is registered to lobby the governmental agency for which the candidate is seeking election or the governmental agency of the elected state officer*."

Section 85702 differs from previous incarnations of the lobbyist prohibition in several important ways.

First, section 85702 is narrowly tailored to prohibit only contributions from or made by lobbyists who engage in lobbying of the agency associated with the recipient (as opposed to the Act's original prohibition of *all* lobbyist contributions in section 86202). Thus, section 85702 is much more narrowly focused on preventing "apparent and actual corruption and improper influence."

Second, unlike Proposition 208's section 85704, section 85702 does *not* prohibit contributions "through, or arranged" by a lobbyist. Rather, the prohibition of section 85702 is narrower and applies to contributions a lobbyist "make[s]" or a candidate "accepts" "from" a lobbyist." Thus, lobbyists are free to advise their clients about client campaign contributions. (Reg. 18572.)

While some may argue that the change in wording from the Prop. 208 version (85704) to the current version (85702) to exclude the words "through or arranged by" a lobbyist evinces an intent to exclude transactions described in regulation 18626, the fact is that no such distinction was made by the voters in adopting section 85702. Though section 85704 was enjoined by the Court along with almost all of the rest of Proposition 208, nothing in the voter pamphlet materials which discussed section 85702 made *any* reference to an intent to narrow the ban. In fact, the materials state an intent to prevent "ANY" contributions from lobbyists. (See discussion of voter intent in Part II, *infra*.) Moreover, the statutes themselves are very different, embracing different concepts. For instance, Proposition 208 made no reference at all to contributions that lobbyists "make," as is done in section 85702. Proposition 208 also speaks to campaign and officeholder accounts, an account scheme not present in the Proposition 34 reforms. Proposition 208 also looked solely to the conduct of the candidate or officeholder, whereas section 85702's prohibition specifically addresses both candidate and lobbyist separately. As a matter of historical construction, then, nothing prevents the Commission from interpreting section 85702 on its own terms.

Court Declares Section 85702 Constitutional

Last year, the Commission was named in a lawsuit, *Institute of Governmental Advocates, et al., v. Fair Political Practices Commissio*n (2001) 164 F.Supp.2d 1183, challenging the constitutionality of section 85702 in federal district court. On September 17, 2001, District Court Judge Frank Damrell, Jr. issued an opinion upholding the constitutionality of section 85702 in the face of the challenge by lobbyists who claimed that the statute violated their First Amendment rights of freedom of speech and association, and their Fourteenth Amendment right to equal protection. In ruling the statute was constitutional, the Court focused exclusively on the ban on contributions made by lobbyists. The Court found section 85702 narrower than the statute overturned in 1979, citing the numerous avenues of participation in the process that remain unfettered, such as contributing to those candidates they are not registered to lobby, to political parties and PACs, making independent expenditures, volunteering services and advising employers. (*Id.*, at pp. 1192-1193; emphasis in original.)

Accordingly, the Court concluded the statute reasonably treats lobbyists differently from other members of the public and therefore is constitutional. (*IGA v. F.P.P.C., supr*a, 164 F.Supp.2d, at p. 1195.)

II. THE LANGUAGE OF SECTION 85702 DOES NOT LIMIT ITS APPLICATION

The preceding section reveals that no court construing California's attempts at regulating lobbyist conduct has specifically ruled on the question of whether a prohibition on a lobbyist's delivery of another's contribution is constitutional. One also must answer, however, whether the statute itself supports such an interpretation. While it may go without saying, the first step in interpreting a statute's meaning is to look at the words of the provision itself. The pertinent part of section 85702 states, "*[a]n elected state officer or candidate for elected state office may not accept a contribution from a lobbyist* …."

The Commission is called upon to determine precisely when and under what circumstances a candidate or officeholder "accept[s] a contribution from a lobbyist."

Read literally, the language of the statue prohibits a candidate or officeholder from accepting a contribution from a lobbyist. No other language in the statute further narrows its scope other than the requirement that the lobbyist be registered to lobby that candidate or office. In other words, the statute does not qualify the prohibition by stating that a candidate may accept certain contributions "from" lobbyists in one set of circumstances but not another. Rather, the statute forthrightly prohibits a candidate or officeholder from accepting "a" contribution "from" a lobbyist. Nothing in the remaining language of the statute suggests ambiguity in these words.

While the literal language of enactments may be disregarded to avoid absurd results and to fulfill the apparent intent of the framers, no absurdity results in construing the words of section 85702 in their plain meaning – that is, to prohibit a lobbyist from delivering a contribution check on behalf of a donor. In fact, just the opposite is true, as stressed by lobbyists in litigation over the statute. In a brief to a federal district court, the Institute of Governmental Advocates and individual lobbyists emphasized to the court that construing section 85702 to prohibit a lobbyist's contribution of *personal* funds but allowing the lobbyist to "deliver a contribution check to a sitting legislator of up to $3,000 from anyone" is "**irrational if prevention of corruption or the appearance of corruption is the asserted state interest**." (Plaintiffs' Opp. To Defs.' Mot. For Summary Judgment, at p. 8, in *Institute of Governmental Advocates v. F.P.P.C., supra,* CIV. S-01-0859.) As the Court in that case ruled, and as embodied in regulation 18572, section 85702 prohibits a lobbyist's contribution of personal funds. Therefore, to borrow the lobbyists' words, to read the statute to allow a lobbyist to deliver the contribution of another is an "irrational" construction of the statute.

Even if the statute was in some manner found ambiguous and an alternative conclusion otherwise rational, the fallback of turning to the voters' intent to clarify the meaning of the statute only reinforces the broad construction. In the ballot pamphlet materials before the voters in November of 2001 when Proposition 34 passed, the title and summary stated the proposition "[p]rohibits lobbyists' contributions to officials they lobby." (Official Voter Information Guide, 2000 General Election Ballot Pamphlet, at p.12.) The analysis by the Legislative Analyst states Proposition 34 "prohibits contributions from lobbyists to state elective officials or candidates under certain conditions." (*Id*., at p. 13.) Proponents of Proposition 34 argued in the ballot pamphlet that "[p]roposition 34 bans lobbyists from making ANY contribution to any elected state officer they lobby" (*Id*., at p.16, emphasis in original) and that "[l]obbyists will be forbidden from making contributions." (*I*d., at p.17.)

The "legislative intent" in construction of a voter-passed initiative is not the intent of the Legislature but the intent of the *voter*s. (*Taxpayers to Limit Campaign Spending v. F.P.P.C.* (1990) 51 Cal.3d 744, 764.) Regardless of what the legislative drafters may

have intended,[5] if that interpretation was not made known to the voters then it cannot be said that the voters embraced or shared that interpretation. (*Id.*, at p. 764, fn. 10.) The statements contained in the ballot pamphlet suggest that a significant argument in favor of the proposition was its function in preventing "ANY" contributions by lobbyists to elective state officials. Combine those statements with the almost single-minded focus of the voters to curb the money connection between lobbyists and officeholders as evidenced by three propositions adopted over nearly a 30-year span, and one can see that the proposed regulation is consistent with the voters' intent in adopting section 85702.[6]

III. THE PROPOSED REGULATION AND THE FIRST AMENDMENT

While many courts, as indicated below, have found that lobbying implicates First Amendment guarantees of petition, expression and assembly, "the United States Supreme Court has never defined the scope of these rights." (*Kimbell v. Hooper* (1995) 164 Vt. 80, 83.) Generally speaking, even beyond lobbying activity, restrictions on campaign finance which burden expressive activity under the First Amendment must be narrowly tailored to serve a compelling governmental interest. (*Austin v. Michigan Chamber of Commerce* (1990) 494 U.S. 652, 652, citing *Buckley v. Valeo* (1976) 424 U.S. 1.) The United States Supreme Court has recognized, however, that while limitations on political *expenditures* impermissibly infringe on associations' ability to amplify the voices of their members, limitations on political *contributions* "leave the contributor free to become a member of any political association and to assist personally in the association's efforts on behalf of candidates." (*Nixon v. Shrink Missouri Gov't PAC* (2000) 528 U.S. 377, 387, quoting *Buckley, supra*, 424 U.S. at 22.) Moreover, the Court has held that "[n]either the right to associate nor the right to participate in political activities is absolute." (*Id.*) Even a "significant interference with protected rights of political association may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms." (*Buckley, supra*, 424 U.S. at p. 25.)

Courts at all levels recognize corruption or the appearance of corruption as a "sufficiently important interest" justifying such a restriction. (*F.P.P.C., supra*, 25 Cal.3d at p. 45; *California Prolife Council Political Action Committee v. Scully, supra*, 989 F.Supp. at p. 1294; *North Carolina Right to Life v. Bartlett* (4th Cir. 1999) 168 F.3d 705, 715; *Shrink Missouri, supra*, 528 U.S. at p. 390.) The intent of section 85702 is to prevent actual and apparent corruption and undue influence by largely severing the tie

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[5] Statements from the statute's primary drafter, Senator John Burton, nonetheless reaffirm this reading. In a declaration filed in the *IGA v. FPPC* case, Senator Burton stated because "the public has a strong perception that there is corruption when lobbyists make contributions to the very persons whose decisions they are seeking to influence," he determined that the "best way to remove the appearance of corruption in the minds of the public was simply to prohibit the practice altogether." (Decl. of Sen. Burton, 7/20/01, at p.2.)

[6] This interpretation is not inconsistent with the Commission's narrower interpretation of the statute's ban on contributions made by a lobbyist's personal funds. (Reg. 18572.) There, the Commission was constrained by constitutional protections afforded contributors, as well as considerations of statutory construction with other sections in the Act.

between lobbyists and contributions made to the candidates and officials whom they are lobbying. (*IGA v. F.P.P.C., supra*, 164 F.Supp.2d at p. 1189.)

The critical step in all constitutional analysis is to link the restricted or governed activity with a constitutional right. For purposes of this analysis, one may generally say that in a typical campaign regulation scenario, such as contribution limitations, there are two primary actors - the contributor and the candidate receiving the contribution. In the context of section 85702, one also considers the role of the lobbyist.

Turning first to the rights of a contributor, several points are important. Under *Buckley v. Valeo, supra*, a contribution limit involving "significant interference with the First Amendment's associational rights will survive if it is demonstrated that the regulation is closely drawn to match a sufficiently important interest. (*Shrink Missouri, supra*,528 U.S. at pp. 387-388, citing *Buckley v. Valeo, supra*.) A contribution limitation that survives a challenge based on the First Amendment's associational guarantee will *also* survive a free speech challenge under that amendment. (*Id*., at p. 388.)

From a candidate's perspective, campaign contribution regulations are constitutional so long as "there is no indication that the contribution limitations … would have any dramatically adverse effect on the funding of campaigns and political associations, and thus no showing that the limitations prevented the candidates and political committees from amassing the resources necessary for effective advocacy." (*Shrink Missouri, supra*, 528 U.S. at pp. 395-396, quoting *Buckley, supra*, 424 U.S. at p.21; internal quotations omitted.)[7]

A Regulation Addressing Delivery of Contributions Does Not Substantially Interfere with Anyone's Protected Rights

Regardless of whether one is looking at the contributor, candidate or lobbyist, the proposed regulation does not implicate fundamental rights of association or speech under the First Amendment. First, prohibiting *delivery* by a lobbyist of another's contribution check in no way limits the amount a contributor may contribute. Because the regulation does not limit the amount of a contribution, the candidate's ability to amass resources for advocacy is not impeded. For the same reason, the contributor's free speech rights are equally untrammeled - he or she remains free to contribute to the candidate of his or her

[7] Even within a given area of status - such as contributor or candidate - courts will apply a different standard in judging whether restriction is permissible. In other words, not all regulation within the field of campaign-related activity is treated equally. Depending on the restriction, a court may employ the difficult-to-survive "strict scrutiny" standard in evaluating the rule, or may employ a much more forgiving, lesser threshold to uphold the statute. For instance, the California Supreme Court in *F.P.P.C. v. IGA, supra*, observed that "not every limitation or incidental burden on a fundamental right is subject to the strict scrutiny standard." (*F.P.P.C., supra*, 25 Cal.3d at p. 47.) Rather, "[w]hen the regulation merely has an **incidental effect** on exercise of protected rights, strict scrutiny is not applied." (*Id.*, citations omitted, emphasis added.) Thus, while the Court struck down under strict scrutiny analysis the prohibition on lobbyist contributions which was seen as overbroad, the registration, reporting and gift provisions did not have a "real and appreciable impact on the legitimate exercise of the rights of petition and speech, and the strict scrutiny test [was] inapplicable." (*Id*., at pp. 47-49.) The latter provisions, therefore, survived challenge.

choice. The lobbyist remains free to advise the contributor regarding that choice. The only restriction is that the candidate cannot accept contributions from the lobbyist instead of the contributor. As for the lobbyist, we have found no authority for the notion that a lobbyist is constitutionally entitled to deliver, by whatever means, a contribution to the hands of a candidate for office. In other words, there is no authority for the suggestion that a lobbyist's speech or association rights include the right to deliver someone else's money to a candidate. At its word, the regulation works only an incidental burden on the contributor who no longer will enjoy the "convenience" of having a lobbyist deliver his or her contribution. Accordingly, staff is unable to identify any constitutional barrier to the adoption of the proposed regulation.

Some members of the Commission have asked what benefits arise from this construction of the statute. The primary benefit is the placing of a barrier between governmental decision-making and campaign contributions. A lobbyist is paid to do one thing – influence the decisions made by government officials. Through the lobbyist contribution ban, Proposition 34 makes a clear statement that the lobbyist's job should not include funding the campaign of a government decision-maker whom he or she is lobbying. In upholding a ban on lobbyist contributions during the legislative session, the U.S. Court of Appeals for the Fourth Circuit discussed the dangers of tying campaign money to governmental decision-making:

> "In evaluating the state interest in this case, we find a genuine risk of both actual corruption and the appearance of corruption. With respect to actual corruption, lobbyists are paid to effectuate particular political outcomes. The pressure on them to perform mounts as legislation winds its way through the system. If lobbyists are free to contribute to legislators while pet projects sit before them, the temptation to exchange "dollars for political favors" can be powerful. [Citation omitted.]
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> . . . While lobbyists do much to inform the legislative process, and their participation is in the main both constructive and honest, there remain powerful hydraulic pressures at play which can cause both legislators and lobbyists to cross the line. State governments need not await the onset of scandal before taking action.
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> The appearance of corruption resulting from … lobbyist contributions during the legislative session can also be corrosive. Even if lobbyists have no intention of directly "purchasing" favorable treatment, appearances may be otherwise. The First Amendment does not prevent states … from recognizing these dangers and taking reasonable steps to ensure that the appearance of corruption does not undermine public confidence in the integrity of representative democracy. [Citation omitted.]" (*North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 715-16 (4th Cir. 1999).

The proposed regulation interprets Proposition 34's lobbyist contribution ban in a manner that lessens the possibility of actual and apparent corruption by insuring that a lobbyist will not be delivering money – his own or his client's – to a government decision-maker while lobbying on a proposed government action. The lobbyist and official will avoid actual corruption by not exchanging government action for campaign dollars. The public's trust in government will not be undermined by a system that allows one to wonder whether the official is being influenced by the campaign check laid on the table during a meeting with the lobbyist. To interpret Proposition 34 as prohibiting the lobbyist from delivering his own contribution, but not that of the client who desires the government decision, is, as the lobbyists themselves acknowledged, "irrational."

The proposed regulation admittedly allows the client to get the money into the hands of the decision-maker through many vehicles. A substantial benefit remains, however, from a rule that removes any possibility of money being exchanged during a face-to-face meeting between lobbyists and government officials. That benefit inures to the public most immediately, but also to the government official and the lobbyist, who will not be tempted and will no longer be put on the defensive by such an exchange.

IV. PROPOSED EMERGENCY REGULATION 18572.2

Proposed regulation 18572.2, Exhibit 2, has two versions. Version "2" reflects the view that section 85702 only limits a candidate from receiving contributions that are prohibited by regulation 18572. If the Commission believes the law intends to prohibit candidates from receiving any contributions delivered by lobbyists, then the Commission may consider the language in Version "1". This version primarily prohibits candidates from accepting contributions that are delivered by lobbyists. Policy decisions remain, however, with respect to the scope of that prohibition. For instance, does the prohibition apply to agents/committees of the lobbyist and candidate? Does the prohibition apply only to contributions that are personally delivered to the candidate, or does it include contributions mailed by the lobbyist or delivered by an associate? Also, should an affirmative defense be provided in the event a reasonable candidate did not know of the lobbyist's involvement with the contribution? These issues are discussed more fully below in the breakdown of each subdivision of the regulation.

A. Subdivision (a) of Regulation 18572.2, version 1.

Subdivision (a) restates in part the text of section 85702, that an elected state officer or candidate for such office may not accept a contribution from a lobbyist if that lobbyist is registered to lobby that candidate/officeholder or office. Thus, the regulation speaks to the candidate/officeholder's responsibility under the regulation. This is different from regulation 18572, the recently-adopted regulation which governs from what funds a lobbyist can make a contribution.[8]

[8] Nevertheless, a lobbyist remains liable under section 83116.5 if he or she purposely causes a candidate or officeholder to violate this section or otherwise aids and abets another in violating section 85702. (§§ 83116.5 and 84510, subd. (b).)

B. Subdivision (b).

This subdivision defines "accept[s] a contribution from a lobbyist." Subdivision (1) states the prohibition applies to contributions personally delivered to the candidate by the lobbyist. This language contemplates a narrower application of the statute to apply only to face-to-face exchanges between the candidate/officeholder and the lobbyist. This subdivision also defines "personally deliver" to include delivery of copies of a contribution. This language is identical to language defining "personally deliver" in the context of section 84309, the prohibition on the making of contributions on state property. (Reg. 18439, subd. (a).)

Decisions 1 and 2 provide optional language that would expand the prohibition beyond the primary actors to the delivery of contributions to the candidate's staff or committee (Decision 1) and/or by the lobbyist's agent (Decision 2). Expansion to cover the associates of the candidate and lobbyist, while ostensibly laudable, may be costly in terms of complicated application. On the one hand, an expansive interpretation gives broadest protection from any possible allegation of corruption. On the other hand, as the statute speaks to the responsibilities of the candidate, inclusion of the candidate's staff or committee may increase the likelihood of an inadvertent violation charged to the candidate. This may especially be true if the contribution is accepted by staff of a candidate whose duties or responsibilities render him or her unfamiliar with a given lobbyist's occupation. Similarly, it may be argued that extension of the prohibition to the lobbyist's associates is unnecessary if the purpose of the statute is to prevent the corruptive appearance of the exchange of money between a lobbyist and the person he or she is registered to lobby.

Decision 3 also pertains to the scope of the prohibition. The question to be decided in subdivision (b)(2) is *whether the prohibition applies beyond contributions personally delivered by the lobbyist*. (This decision also impacts subdivision (c) of the proposed regulation.) Subdivision (b)(1) applies to contributions "delivered in person." Subdivision (b)(2), however, applies to contributions "otherwise transmitted." Under this optional language, a candidate would be prohibited from accepting a contribution if the contribution is mailed, delivered by courier, or otherwise delivered in a manner that would indicate to a reasonable person that the contribution was transmitted by a lobbyist. Thus, if a lobbyist mailed a check from his client to the candidate and enclosed a cover letter signed by the lobbyist, the candidate would be prohibited from accepting the contribution.

Inclusion of "knows or should know" is intended to provide a measure of protection to the candidate from unintended violations. In this way, the statute does not operate as a "strict liability" statute but instead protects a candidate from violation of the statute if there was no reason to know the contribution was from a lobbyist.

As above in the context of Decisions 1 and 2, the Commission is called upon to make a decision regarding the scope of the prohibition. A narrower construction largely results in an application less susceptible to error or mischief. A broader construction

necessarily reaches more conduct and arguably presents more complicated scenarios of application.

C. Subdivision (c).

The last subdivision provides an affirmative defense for a candidate who can prove that he or she did not know the contribution was delivered by a lobbyist and, within a prescribed time period, returns the contribution. This is intended as a further protection against an inadvertent technical violation of the statute. This section would require a candidate or officeholder to return a contribution once he or she becomes aware of a lobbyist's involvement in the delivery or transmission of the contribution. Therefore, even if the candidate is not aware when the contribution is received that it is a prohibited contribution, the candidate would have to return the contribution once becoming aware of this fact. **Decision 3 is conforming language to reflect the decision made with respect to proposed subdivision (b)(2)**.

Decision 4 provides options for the time within which the candidate must act to return the contribution once the involvement of the lobbyist becomes known to the candidate. The word "promptly" is used elsewhere in the Act and contains inherent flexibility. The Commission may determine, however, that a more precise definition of the timeline for action is preferable. The 14-day allowance is patterned after existing deadlines in other areas for return of excessive contributions (regulation 18531, subdivision (b)). The Commission may determine that a shorter time to act is preferable, given the goal of combating the appearance of corruption. Therefore, shorter timelines are provided as an option as well. Some have suggested, however, that too short a deadline, less than 48 hours, may prove unworkable in the day-to-day operations of a campaign committee.

Staff Recommendation: Staff has not reached a consensus as to which version the Commission should adopt and therefore makes no recommendation in this regard.

JUSTIFICATION FOR EMERGENCY ADOPTION

Should the Commission wish to adopt a regulation that determines section 85702 prohibits in some manner contributions delivered by lobbyists to candidates for elective state office, staff proposes the regulation be adopted as soon as possible, given the looming November general election. Because such a regulation would require lobbyists and candidates depart from traditional practice with respect to fundraising by prohibiting candidate acceptance of contributions delivered by lobbyists, and because fundraising activities will increase greatly with the approach of the election, staff proposes that such a regulation be adopted on an emergency basis. Attached as Exhibit 1 to this memorandum is the draft regulation containing a statement of finding of an emergency for the Commission to adopt should it wish to adopt a regulation on an emergency basis. The regulation could be adopted on a permanent basis in July.

Exhibits:

1. Regulation 18572
2. Regulation 18572.2.